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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	PACA Docket No. D-98-0002
)	
Kirby Produce Company, Inc.,)	
)	
Respondent)	Decision and Order

This decision is made pursuant to a remand from the Court of Appeals for the District of Columbia (*Kirby Produce Company, Inc. v. USDA*, 256 F.3d 830 (2001)) and from the Judicial Officer (*In re Kirby Produce Company, Inc.*, 60 Agric. Dec. ____ (Aug. 27, 2001)).

The proceeding originally was instituted by a complaint filed on October 20, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, Kirby Produce Company, Inc., had committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 20 sellers for purchases of 206 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of \$1,609,859.45 during the period August 1995 through July 1996. Section 2(4) of the PACA requires "full payment promptly" for produce purchases. The Department's regulations interpret this as payment within ten days after the day the produce is accepted. (7 C.F.R. § 46.2(aa)(5).)

Respondent filed an answer to the complaint on November 12, 1997, and an amended answer on December 4, 1997. A hearing was set for January 13, 1999. On November 12, 1998, Respondent sought a delay of the scheduled hearing so that it could make full payment to all trust creditors pursuant to an order entered on June 25, 1996, by a United States District Court (*Brown's Produce, et al. v. Kirby Produce Company, et al.*, Case No. 3:96-CV-526 (E.D. Tenn. 1996)). The request was denied on November 16, 1998.

On December 4, 1998, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions and a request for official notice of the District Court's order and attachments. On December 31, 1998, I issued a Decision Without Hearing by Reason of Admissions finding that, based on the Court's order and attachments thereto, Respondent had admitted failing to pay \$1,602,736.16 to 19 sellers of perishable agricultural commodities, and that \$1,215,723.99 of this amount remained past due and unpaid as of December 2, 1998. I found that Respondent committed wilful, repeated, and flagrant violations of section 2(4) of the PACA and ordered that its license be revoked. The hearing scheduled for January 13, 1999, was canceled.

On July 12, 1999, the Judicial Officer issued a decision and order affirming my initial decision. *Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999). Respondent appealed this order to the United States Court of Appeals for the District of Columbia Circuit. On November 13, 2000, the court issued an order requiring Respondent, Kirby Produce, to certify whether the PACA creditors named in the complaint of October 20, 1997, were paid in full prior to the hearing date of January 13, 1999. On November 17, 2000, Kirby stated that the creditors had been paid.

On August 3, 2001, the Court, in *Kirby Produce Company, Inc. v. USDA, supra*, issued an opinion granting Kirby's petition for review and remanded the case for proceedings consistent

with its opinion. In its opinion, the Court affirmed the Judicial Officer's finding that Kirby had not promptly paid its PACA creditors, but found that a material issue of fact existed whether Kirby could have paid its creditors by the date of the hearing scheduled for January 13, 1999. The significance of the payment date is that it would determine the penalty for Kirby's violation of the PACA. Payment by the hearing date would convert the case from "no-pay" to "slow-pay" which would result in a PACA license suspension rather than a license revocation under the Judicial Officer's policy in effect at the time the complaint was filed. *See Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984).¹ On August 27, 2001, the Judicial Officer remanded the matter to me to conduct a hearing to determine "whether Respondent is in full compliance with the PACA at the time the hearing in this proceeding actually commences."

A hearing on remand was held on March 26, 2002, in New York City. Complainant was represented by Eric Paul, Esq. Respondent did not appear at the hearing. Its counsel, Paul T. Gentile, Esq., submitted the following letter regarding Respondent's decision not to appear.

¹This policy was changed in 1998 in *Scamcorp, Inc.*, 57 Agric. Dec. 527. Under the new policy, the date of the hearing no longer necessarily controls whether a license is suspended or revoked. A license will now be revoked if full payment is not made within 120 days after a complaint is served on a respondent or by the date of the hearing, whichever occurs first.

Gentile & Dickler
Attorneys at Law
15 Maiden Lane
New York, NY 10038

March 25, 2002

James W. Hunt, A.L.J.
c/o U.S. District Courthouse
500 Pearl Street
New York, NY 10007

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

Late Friday afternoon, March 22, 2002, I was notified by the principals of the above named Respondent, that personal and financial considerations would prevent any further litigation of the case. Thereafter, I unsuccessfully attempted to prevent the necessity of persons traveling to New York in order to conduct the hearing. I have been informed by Mr. Paul that the Department intends to proceed with the case.

In conjunction with the hearing, I have previously supplied Mr. Paul with copies of promissory notes presented to the produce creditors of the Respondent. It is my understanding that Tennessee counsel for the Respondent, Lynn Tarpy, Esq., prepared and presented the notes to the creditor. He further informs me that no note was returned or rejected.

Regretfully, the posture of my clients prohibit my appearance at the hearings. In addition no one else will appear on behalf of the Respondent.

Thank you for the courtesies extended the Respondent and this office. Kindly make this letter part of the record of this proceeding.

Very truly yours,

/s/

Paul T. Gentile

PTG:ah
cc: Kirby Produce Company, Inc.

I ruled that Mr. Gentile's letter and the promissory notes referred to therein be made a part of the record in order to comply with the Court's remand order to determine whether Respondent had made full payment to its creditors.²

At the hearing on March 26, 2002, Complainant presented evidence that Respondent had made partial payment on its debt of \$1,609,858.45 to its produce creditors, but that Respondent had failed to make full payment as of that date. Josephine Jenkins, a marketing specialist, testified that she reviewed the records relating to payments that Respondent had made and that she had also attempted to contact the creditors. She determined that, as of February 22, 2002, the amount remaining unpaid came to \$1,346,859.78. (Tr. 63; CX 45.)

Respondent's promissory notes that I entered in the record are all dated June 26, 1966, and are all identical, except for a different produce creditor and amount due on each note. (RX 1.) They provide:

PROMISSORY NOTE

June 26, 1996

For value received, Kirby Produce Company (Kirby) hereby promises to pay to [name of creditor] the principal sum of [amount owed the named creditor] plus interest at the rate of 5 1/4% pursuant to the Order of the United States District Court for the Eastern District of Tennessee Case Number 3:96-CV-526. This represents payment in full of any and all claims the holder of this note may have against Kirby under the Perishable Agricultural Commodities Act. In the event of default on this note, holder's remedy shall be limited to its rights under the Order of the Court and this note.

²I made this ruling as I believe, in this case, the Court's directive overrides the Department's Rules of Practice which provide that a respondent who fails to appear at a hearing is deemed to have admitted any facts which may be presented at the hearing and is considered to have admitted all the material allegations of fact contained in the complaint. 7 C.F.R. § 1.141(e).

Apart from Mr. Gentile's statement that creditors had not returned or rejected the notes that Respondent had given them, Respondent offered no evidence on whether these promissory notes were accepted by any of its creditors as constituting payment of its debt to them.

Complainant's exhibit CX 41 indicates that one creditor, Juniper Tomato Growers, Inc., may have accepted a promissory note as payment in full for the produce it sold to Respondent. However, there is no evidence that any of the other creditors accepted the notes as payment. Moreover, Ms. Jenkins testified that the creditors she contacted told her that they did not accept the notes as payment. (Tr. 50-53.) Complainant also presented as witnesses representatives from three of Respondent's produce creditors who jointly were owed over one million dollars. They all testified that they did not accept the notes as payment for the produce debt.

Gordon Tatum, president of Gordon Tatum, Inc.:

Q. Did you, in fact, when you received this promissory note, consider it full payment?

A. No, I did not. (Tr. 78.)

Charles Weisinger, president of Weis-Buy Services, Inc.:

Q. I'm assuming you never agreed to accept a promissory note as full payment of the outstanding debt?

A. No, sir. (Tr. 103.)

Garford Tony Hill, president and owner of Apple Action Fruit Sales, Inc.:

Q. You did not at any time agree with Mr. Randy Kirby to accept a promissory note in full payment for your debt, is that correct?

A. You mean to write my debt off in exchange for a promissory note?

Q. That's correct.

A. Absolutely not. (Tr. 123.)

Discussion

In its remand opinion the Court of Appeals affirmed the finding by the Judicial Officer that Respondent, as alleged in the complaint, had failed to make full and prompt payment for its produce purchases. Accordingly, as I found previously, Respondent's failure to pay promptly constitutes wilful, repeated and flagrant violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Judicial Officer's policy at the time the complaint in this matter was filed in 1997, and his policy since at least 1965, was that a promissory note that a produce buyer gives to a creditor as payment on the debt it incurred when it purchased produce does not extinguish that debt in the absence of an agreement to that effect. *Federal Fruit & Produce Company v. Sandy's Produce*, 24 Agric. Dec. 1121 (1965); *Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872 (1991).³

Respondent here has not shown that its creditors, except for perhaps one, agreed to accept promissory notes as payment for Respondent's purchases of perishable agricultural commodities. The failure of creditors to expressly reject or return the notes to Respondent does not constitute an implicit agreement by them to accept the notes. 17A Am. Jur. 2d *Contracts* § 71. Indeed, what evidence was presented shows that the creditors spurned the notes. Respondent presented no other evidence that, as of the date of the remand hearing, it had paid in full the \$1,346,895.78 that remained unpaid. As Respondent failed to be in compliance with the full and prompt

³This policy was changed in *Scamcorp, supra*. Under the new policy, a promissory note does not extinguish the debt, even if the parties so agree, unless it is also shown that the agreement was arrived at through arm's length negotiations.

payment requirement of the PACA as of the hearing on March 26, 2002, the sanction for its non-compliance is revocation of its license.

Findings of Fact

1. Respondent, Kirby Produce Company, Inc., a Tennessee corporation, whose business address is 2127 Chipman Street, Knoxville, TN 37916, was issued PACA license number 931573. (CX 1.) This license has been renewed annually and is next subject to renewal on or before October 27, 2002.

2. During the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities and failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15.

3. As of March 26, 2002, \$1,305,148.78 of the \$1,602,736.15 that Respondent owed to 19 sellers for purchases of perishable agricultural commodities in interstate commerce remained past due and unpaid.

Conclusion of Law

The failure of Respondent, Kirby Produce Company, Inc., to make full payment promptly of its purchases of perishable agricultural commodities constitutes repeated, flagrant, and wilful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

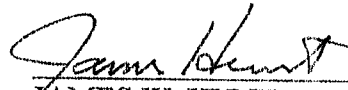
Order

Respondent's PACA license is hereby revoked.

This Order shall be published.

This Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

July 8, 2002



JAMES W. HUNT
Administrative Law Judge